CJA/FEDERAL NEWS **April 25, 2003**

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IDEAS AND INFORMATION

Feeney Amendment

The House of Representatives voted to essentially outlaw downward departures unless they are supported by the prosecutor ! This legislation is called the "Feeney Amendment" and was passed on March 27, 2003, by the House of Representatives. The Amendment was part of HR1104, a larger bill that included the "Amber alert" child abduction act and an anti-child pornography bill (designed to over-rule the Ashcroft v. Free speech case).

The Feeney Amendment, was allowed just 20 minutes of debate in the House and came out of the blue. It is a Department of Justice (read Ashcroft) sponsored set of changes to the laws that govern sentencing practice in federal courts. The bill then went to the Senate making a stop along the way for "conferencing". Following a huge lobbying effort by NACDL, ACLU, the judiciary among others, some aspects of the proposal were "toned down"by the a Hatch-Sensenbrenner amendment. When we are relying on Orin Hatch as our "best ally" you know it is a tough situation. While the original proposal sought to effectively bar most non-cooperation downward departures, the amended version is more limited as outlined below. The amendment still directs the Sentencing Commission to amend the guidelines and policy statements **"to ensure that the incidence of downward departures are substantially reduced."** It passed overwhelmingly in both the House (400 to 25) and Senate (98-0). Senator Edward M. Kennedy (D-MA)and Rep. Bobby Scott worked hard to defeat this in conference and MA Representative William D. Delahunt, a former prosecutor spoke out against the proposal on the House floor. From his speech:

> "Mr. Speaker, I would like to be able to vote for this bill. It includes provisions that I strongly support-including the "AMBER Alert" system that would aid in finding missing children. But those children have been taken hostage by a bill that also includes so-called "sentencing reforms"-radical,
> sweeping changes to the federal sentencing system that were never considered by any committee of either House. Provisions that would cause an explosion in the number of people behind bars-including many who simply do not belong there.
> .....
> The rate of incarceration in the U.S. is seven times higher than that of such advanced nations as Germany, Italy, and Denmark. A primary reason for this is that a large number of our prisoners are serving long terms for minor nonviolent offenses. And

if this bill becomes law, there will be a lot more of them.

Men in prison cannot raise families, cannot hold jobs, cannot pay taxes, and cannot support the economy. And when they get out, many who might have turned their lives around will have become hardened criminals, ready to return to the only life they know. Conservatives and liberals alike have
recognized that this situation poses a threat to the future of our cities, our families, our economic well-being, and the health of our democracy itself. Growing numbers of prominent conservatives have joined in calls for an end to mandatory minimum sentences. Yet this bill takes a giant-and
potentially catastrophic--step in the wrong direction.
.....

The truth is that the vast majority of the downward departures are sought, not by the judge, but by the government itself. Of the nearly 20,000 downward departures granted in 2001, 79 percent were requested by the prosecution-most in return for the cooperation of the defendant, and the rest in five Mexican border districts in which the government uses departures to clear cases more quickly.

If the sponsors of the bill have concerns about the rate of downward departures, the Justice Department is where they should be making inquiries. As a former prosecutor, I can see plenty of reasons to question the overuse of departures as a law enforcement tool.

But depriving judges of the ability to exercise discretion cannot be the answer. A rigid, mechanical system of sentences cannot do justice-either to the accused or to the society to which the millions we imprison today will one day return."

Summary of Feeney Amendment as passed:

1. Establishes new, separate departure procedure and standards for child-related offenses and sex offenses. Only permissible departures are those that the Commission specifically enumerates.

2. Limits departures based on age and physical impairment in child and sex cases.

3. Prohibits departures based on gambling dependence, aberrant behavior, family ties, and diminished capacity in child and sex cases only.

4. Establishes de novo appellate review of all departures (thus overruling *Koon*).

5. Prohibits downward departure on remand based on new grounds in all cases.

6. Requires government motion for extra 1-level adjustment based on timely acceptance of responsibility, repeals timely disclosure as basis for adjustment, and prohibits the Commission from ever altering this amendment.

7. Chills departures by imposing more burdensome reporting requirements on judges who depart, and gives DOJ access to Commission data files that identify each judge's departure practices.

8. Requires DOJ to report downward departures to Judiciary Committees, unless within 90 days AG reports to Congress on new regulations for opposing and appealing downward departures.

9. Directly amends pornography guidelines and commentary and prohibits the Commission from ever altering that text.

10. Prohibits the Commission, for a period of two years, from adding new departure grounds or passing amendments that are inconsistent with the departure restrictions.

11. Directs the Sentencing Commission to amend the guidelines and policy statements "to ensure that the incidence of downward departures are [sic] substantially reduced."

12. Limits the number of judges on the Sentencing Commission to three.

In addition to Guideline items the bill:

- Establishes a national communications network to facilitate the recovery of abducted children. The Amber Alert system is named after Amber Hagerman, a 9-year-old girl abducted in Arlington, Texas, and later found murdered.
- Prohibits pandering or soliciting anything represented to be child pornography, including images generated by computers, an attempt to legislate around the *Free Speech* case.
- Denies pretrial release for child rapists or child abductors.
- Extends the statute of limitations for child abductions and sex crimes to the life of the child victim. Most federal laws have a statute of limitations of five years.
- Requires a mandatory sentence of life imprisonment for twice-convicted child sex offenders, whether the previous conviction is federal or state. Federal child sex offenses include sexual abuse, aggravated sexual abuse, sexual exploitation of children, abusive sexual contact, and the interstate transportation of minors for sexual purposes.
- Mandates a minimum 20-year sentence for the kidnaping of a child by a nonfamily member.
- Makes it easier to prosecute sex tour operators and people who travel overseas for sex with minors.
- Allows federal judges to order supervision of released sex offenders for the rest of their lives, compared to the generally five years maximum period of post-release supervision in federal cases.
- Makes it illegal to attempt to take or keep a child outside the United States to avoid custody battles.
- Adds suspected sex crimes against children or sex trafficking as a reason for the federal government to wiretap telephones.
- Requires law enforcement agencies to report missing persons under 21 to the National Crime Information Center. Current law only requires reporting for children under the age of 18.
- Institutes "Code Adam" alerts in all government buildings. A description of children reported missing in government buildings would be communicated around the building and employees would monitor exits. Police would be called if the child isn't found within 10 minutes. The program is named after 6-year-old Adam Walsh, who was abducted from a

shopping mall in Florida and murdered in 1981.

- Makes it a federal crime to use a misleading domain name to trick adults into viewing obscenity on the Internet and or to trick children into viewing "material that is harmful to minors."
- Doubles the sentence for anyone over 18 who intentionally uses a minor to commit a violent crime.
- Makes illegal to use a telephone for transmitting child pornography and to send or display child pornography by computer to children and teenagers.
- Requires convicted child pornographers to register in the National Sex Offender Registry.

Two Million in our Prisons

The Justice Department just reported that the number of people living behind bars in the United States had exceeded two million for the first time in our history. Two million. Included in that number is a staggering 12 percent of African-American men aged 20 to 34.

So, happy are we with the state of affairs in the nation's capital ? Let's see. The Congress is busy either undermining judges with legislation like the Feeney Amendment, or filibustering new judges like Mr. Estrada. No one is blameless here. One party wants laws to circumvent judges who they do not trust while the other party does not want new judges who they don't trust. Seems no judge can be trusted. Meanwhile we can't trust juries either, as the Supreme Court the punitive damages award in *State Farm v. Campbell* (April 7, 2003). Great, we have a nation of untrustworthy judges and crazed jurors who are charged with resolving disputes ! Meanwhile, the Executive Branch is busy relieving itself of those laws the Legislative Branch already has passed. Sure is comforting to know that we are at war to impose this "Democratic System" on others. The "checks and balances" are working so well.

The fee to cover the average cost of incarceration for Federal inmates in 2001 was $22,174, and in 2002 was $22,517. Source: Federal Register: April 18, 2003 (Volume 68, Number 75).

NCIC exempted from Privacy Act of 1974

On March 24, the Justice Department **administratively discharged** the FBI of its statutory duty to ensure the accuracy and completeness of the over 39 million criminal records it maintains in its National Crime Information Center (NCIC) database. This action poses significant risks to privacy and effective law enforcement. The NCIC system provides over 80,000 law enforcement agencies with access to data on wanted persons, missing persons, gang members, as well as information about stolen cars, boats, and other information. The Privacy Act of 1974 requires the FBI to make reasonable efforts to ensure the accuracy and completeness of the records in the NCIC system. Now, the Justice Department has exempted the system from the accuracy requirements of this important law. 68 Fed. Reg. 14140 (Mar. 24, 2003) (to be codified as 28 C.F.R. pt. 16).

For the past thirty years, the FBI has operated the NCIC database with the Privacy Act accuracy requirement in place. The relevant provision requires that any agency that maintains a system of records, "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individuals in the determination." 5 U.S.C. §552a(e)(5). Circumventing that statutory obligation poses significant risks not only for citizens whose record files may be part of this

data system, but also for communities that rely on law enforcement to employ effective, reliable tools for ensuring public safety. On average, there are 2.8 million transaction processed each day, with an average response time of 0.16 second. As a result, any error in the NCIC database can spread across the country in less than a second.

Why you might ask has this happened ? After all, the FBI recently spent $182 million to modernize the data system which now provides law enforcement agencies with instant access to fingerprinting and mugshot images along with more traditional data. Could this be at all related to the overall Ashcroft Justice Department approach to government accountability and citizen rights ? Why would we want rules to apply to the government ? So a few errors in the computers result in some "mistakes". I'm sure those will get sorted out, eventually. A couple hundred wrongful arrests is a small price to pay for our "freedom in these times of war". Well, freedom for those who are not effected by the "Big Brother computers gone wild no oversight rule" that Justice just approved. Mr. Hoover is surely smiling from his grave.

When can a warrant Issue?

The Fourth Amendment imposes strict requirements that must be met before a warrant may issue, in order to protect individuals from intrusive government searches pursuant to general warrants: "No warrant shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

In determining whether there is probable cause for the issuance of a search warrant, the question for this court is whether the issuing judge had a substantial basis for determining that in the light of the totality of the circumstances set forth in the affidavit in support of the warrant, there was a fair probability that contraband or evidence of criminal activity would be found in the area or item sought to be searched. ***Illinois v. Gates***, 462 U.S. 213 (1983).

The Fourth Amendment requires that the judge who issues a search warrant be provided with information from which that judge can make an independent evaluation of probable cause. There must be a sufficient nexus between the contraband to be seized and the place to be searched before a warrant may be issued. An over broad warrant is invalid. ***Andersen v. Maryland***, 427 U.S. 463, 480 (1976). More specifically, "Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence; that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." ***U.S. v. Diaz***, 841 F.2d 1, at 8, (1st Cir. 1988). A warrant application must demonstrate probable cause to believe that (1) a crime has been committed, the "*commission*" element, and (2) enumerate evidence of the offense will be found at the place to be searched, the "*nexus*" element. ***U.S. v. Feliz,*** 182 F.3d 82, para 17 (1st Cir. 1999).

The government will often hide behind *Leon* and "good faith" for flawed warrants, the so called "*Leon exception*". ***U.S. v. Leon***, 104 S. Ct. 3405 (1984). *Leon* recognized that good faith does not apply to a warrant affidavit "so lacking in probable cause as to render official belief in its existence entirely unreasonable" *Leon* at 468 U.S. 923. Suppression is appropriate even when a warrant appears facially valid. *Leon* requires actual good faith by the officers. Hence the defense need not prove actual bad faith, rather the government has the burden by a preponderance to show good faith. *Id.* The applying officer can not excuse his own default by pointing to ... the magistrate." ***U.S. v.***

Vigeant, 176 F.3d 565, 572. It is the burden of the Government to show the officer's "objective good faith". Id. 572-3. Good faith is not available to the Government when shortcomings in the warrant application are attributable to the officer applying. ***U.S. v. Ricciardelli***, 998 F.2d 8, 16 (1st Cir. 1993). The mere submission of an affidavit does not show good faith. A major reason for exclusion of improperly obtained evidence is the deterrent effect on law enforcement. *Leon*, 468 U.S. at 897 and 922. There is no incentive for officers to "get it right" if the courts sanction officers failure to follow the rules and the law. The Fourth Amendment and the probable cause requirement for issuance of a warrant is at the heart of our Constitutional system. Mere conjecture and conclusions by officers can not support good faith any more than it can support probable cause. ***U.S. v. Hodge***, 89 F.Supp2d 668 at 677-78 (D. Virgin Islands 2000)(Warrant defective because it relied solely on officers opinion to satisfy nexus requirement, no good faith exception) .

What constitutes possession for a violation of the law prohibiting a person who is using controlled substances from possessing a firearm ?

This is a tough area. there is a major Federal initiative on regarding gun possession. See the standard possession instruction for the First Circuit.
http://www.med.uscourts.gov/Site/courtroompractices/patternjuryinstructions.htm

> Possession can be actual or constructive, individual or joint. The term "possess" means to exercise authority, dominion or control over something. It is not necessarily the same as legal ownership.
>
> The law recognizes different kinds of possession. Possession includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession", I mean actual as well as constructive possession. Possession also includes both sole and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I have used the word "possession" in these instructions, I mean joint as well as sole possession.

See, ***United States v. Rogers***, 41 F.3d 25, 29 (1st Cir. 1994), discussing dominion, control, possession and ownership. ***United States v. Booth***, 111 F.3d 1, 2 (1st Cir. 1997), counsels against defining constructive possession in terms of dominion and control "over the area in which the object is located" and thereby limits ***United States v. Wight***, 968 F.2d 1393, 1398 (1st Cir. 1992). However, the jury may be told in appropriate circumstances that knowledge could be inferred from control of the area. See *Booth*, 111 F.3d at 2.

Who is a "drug user" for prohibited person status ?
The law on who is a drug user seems pretty vague but has been upheld, see ***United States v. Williams*** 182 F3d 333 (5th Cir. 1999). A defendant was acquitted of possession of a firearm by an unlawful user of controlled substances where the prosecution failed to present evidence suggesting continuous

use or prolonged use of a controlled substance by the defendant. ***United States v. Purdy*** 264 F.3d 809 (9th Cir. 2001)

Vouchers

In the last few months, the U.S. Court of Appeals for the First Circuit has changed the way it reviews Criminal Justice Act payment vouchers. All vouchers that require approval by the Court of Appeals are now being reviewed by a single person, Deputy Circuit Executive Susan Krueger. Ms. Krueger will be reviewing all appellate vouchers and all excess vouchers from the district court. All appellate vouchers for amounts under the statutory maximum will be approved by Ms. Krueger without review by a judge, unless there is a particular issue with the voucher. After reviewing the vouchers that require judicial approval (appellate vouchers over the statutory maximum, excess district court vouchers previously approved by the district court, and appellate vouchers under the statutory maximum as to which there is some issue), if there is any reduction of the voucher anticipated, Ms. Krueger's office will contact the attorney for further information. After reviewing the vouchers as to which no reduction is anticipated, or after giving the lawyer an opportunity to submit additional information with respect to a possible cut, Ms. Krueger will then pass the voucher on with her recommendation to Judge Howard (currently judge on the Court responsible for vouchers) for review and approval. With respect to appellate vouchers, Ms. Krueger may consult with the writing judge if there are issues before making her recommendation directly to Judge Howard.

These changes, adopted at least in part in response to concerns raised by CJA counsel, should streamline the voucher approval process and eliminate unexplained voucher cutting. This new procedure does not alter the procedure for submitting CJA vouchers, change the form of the vouchers, or eliminate the need to include with any excess voucher a memorandum explaining the reasons for exceeding the statutory maximum amounts set out at 18 U.S.C. sec. 3006A(d).

Susan Krueger is willing to discuss this new procedure or answer questions that CJA counsel may have. She can be reached at 617-748-6914.

New First Circuit CJA Appellate Panel, application deadline June 13, 2003

The First Circuit is currently accepting applications to serve on the court's Criminal Justice Act ("CJA") appellate panel. Application forms may be downloaded from the court's website at www.ca1.uscourts.gov under the "CJA Materials" button, or obtained from the Clerk of Court, John Joseph Moakley United States Courthouse, One Courthouse Way, Suite 2500, Boston, MA 02210. **Completed applications and attachments should be mailed to the Clerk and must be received no later than June 13, 2003 at 5 p.m.** All present and former district court CJA panel members are encouraged to apply. You may apply even if you are not on the District court Panel. To receive appeal appointments directly from the First Circuit you MUST apply, even if you have been on the list in the past. It is anticipated that a reconstituted CJA panel will be put in place by the fall.

The court has recently approved a number of policy changes designed to support CJA attorneys in their efforts, as well as to enhance the quality of criminal defense appellate representation. These steps include (1) court sponsorship of a one-day training program; (2) establishment of an advisory committee to review completed application forms and make

recommendations to the court; (3) appointment of CJA panel members to three-year staggered terms; and (4) implementation of a centralized voucher-review system. Further details as to these and related changes can be found on the court's website under the "News Media" button.

SUPREME COURT ACTION

MASSARO V. U.S., Decided: 04/23/03, No. 01-1559
http://laws.lp.findlaw.com/us/000/011559.html

Ineffective Assistance of Counsel Claims Not Barred By Failure to Raise on Direct Appeal
The Court unanimously held that failure to bring an ineffective assistance of counsel argument on direct appeal not procedurally bar the issue on post-conviction petition. This has been the rule in the first circuit but the second circuit had required ineffective assistance to be raised on direct appeal.

ARCHER V. WARNER, Decided: 03/31/03, No. 01-1418
http://laws.findlaw.com/us/000/01-1418.html

Debts From Settlement of Claims Based on Fraud Not Dischargeable
7-2 (opinion by Breyer; dissent by Thomas) A debt owed because of a settlement of a claim based on fraud is not dischargeable under the Bankruptcy Code.

The Court says Bankruptcy Court may look beyond the record of the underlying proceedings in order to determine whether the "debt at issue was a debt for money obtained by fraud." Congress' intent in making the non-dischargeability provision was to ensure that any debt arising out of fraud was not dischargeable. Keep this in mind for those "white collar" cases.

CERT Granted
Arizona v. Gant, Certiorari Granted: 04/21/03, No. 02-1019
Court below: 43 P.3d 188 (Az. App. 2002)
Warrantless Search. The issue in this case is whether a warrantless vehicle search following an arrest violates the Fourth Amendment when a defendant's emergence from his vehicle was voluntary, not in response to police direction, and noninvasive.

United States v. Patane, Certiorari granted: 04/21/03, No. 02-1183
Court below: 304 F.3d 1013 (10th Cir. 2002)
http://laws.findlaw.com/10th/011503.html
Miranda Rights. The issue in this case is twofold, (1) whether probable cause for arrest existed, and (2) whether suppression of the firearm discovered during the arrest is appropriate under the exclusionary rule.

Banks v. Cockrell, Cert. granted: 04/21/03, No. 01-8286
Court below: 48 Fed.Appx. 104 (5th Cir. 2002)
Right to Adequate and Fair Counsel Before a Defendant is Put to Death. The issue in this case is whether the imposition of the death penalty is done in a fair and equitable manner.

Each of these are potentially very important criminal law cases worth keeping an eye on.

Recent First Circuit Decisions

US v. GOLAB, No. 02-1501 (1st Cir. April 07, 2003)
http://laws.lp.findlaw.com/1st/021501.html

Grant of motion to suppress evidence obtained from defendant's car is affirmed where the INS had no reasonable suspicion to stop and search the vehicle. "We agree with the district court that there was no objectively reasonable suspicion to justify a Terry stop of the car in light of the totality of the circumstances. The basis for the stop amounted to no more than an impermissible hunch. *Terry*, 392 U.S. at 27."

US V. WEIDUL No. 02-2135 (1st Cir. March 31, 2003)
http://laws.lp.findlaw.com/1st/022135.html
Grant of motion to suppress gun affirmed. Police undertook a warrantless search of the house after defendant arrested and in custody. Police claimed consent by girlfriend but trial court rejected that argument under totality of the circumstances. 227 F. Supp.2d 161, 162-65 (D. Me. 2002).

"Voluntariness of consent is a factual matter that is subjected to the clear error standard of review, and we adhere to that rule. See *United States v. Laine*, 270 F.3d 71, 74 (1st Cir. 2001); *United States v. Chhien*, 266 F.3d 1, 5 (1st Cir. 2001); *United States v. Barnett*, 989 F.2d 546, 554 (1st Cir. 1993). Under this standard, a district court's choice between two plausible competing interpretations of the facts cannot be clearly erroneous. See *Palmer*, 203 F.3d at 60. Instead, "the only real question for appellate review is whether the evidence presented at the suppression hearing fairly supports [the district court's] finding." *Laine,* 270 F.3d at 75.

"Warrantless search and seizures in the home violate the Fourth Amendment, absent consent or exigent circumstances." *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting). Consent must be voluntary to be valid. See *United States v. Perez-Montanez*, 202 F.3d 434, 438 (1st Cir. 2000). Whether consent is voluntary is to be determined by examining the totality of the circumstances, including the interaction between the police and the person alleged to have given consent. See *United States v. Esquilin*, 208 F.3d 315, 318 (1st Cir. 2000); *Perez-Montanez*, 202 F.3d at 438.

US v. CORREA-TORRES, No. 01-1172 (1st Cir. April 09, 2003)
http://laws.lp.findlaw.com/1st/011172.html
We adopt today a rule to the effect that, if a person facing a proceeding for revocation of probation, parole, or supervised release purposes to waive his rights under Federal Rule of Criminal Procedure 32.1, the district court has an obligation to ensure that the waiver is made knowingly and voluntarily. The waiver here fails to satisfy that criterion. Consequently, we sustain the defendant's appeal, vacate his sentence, and remand for further proceedings consistent with this opinion.

Some say luck comes in groups of three. This case makes three defense wins in less than 10 days. Maybe we are on a role.

US v. NEWTON, No. 01-2636 (1st Cir. April 09, 2003)
http://laws.lp.findlaw.com/1st/012636.html
Convictions and sentences for conspiracy to possess with intent to distribute various illegal substances are affirmed over claims of (1) improper admission of co-conspirators' statements, (2) erroneously excluded evidence, and (3) defense attorney's conflict of interest.

Petrozziello **ruling: Federal Rule of Evidence 801(d)(2)(E)** excludes from the category of hearsay "statement[s] by a coconspirator of a party during the course and in furtherance of the conspiracy." As a predicate for admitting evidence under this rule, the trial court must conclude that "it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy." *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). Significantly, the trial court is not required to decide the Petrozziello question prior to admitting hearsay statements under Rule 801(d)(2)(E), but may "admit the statement[s] provisionally, subject to its final Petrozziello determination at the close of all the evidence." *United States v. Isabel*, 945 F.2d 1193, 1199 n.10 (1st Cir. 1991). Hence, to properly preserve an objection to a Petrozziello ruling, a defendant must ordinarily object both when the hearsay statements are provisionally admitted and again at the close of all the evidence. Generally, "we review the trial court's determination that statements were coconspirator statements under the clear error standard." *United States v. Marino*, 277 F.3d 11, 25 (1st Cir. 2002) (citing *United States v. Mojica-Baez*, 229 F.3d 292, 304 (1st Cir. 2000)). This deferential standard of review places a heavy burden on a defendant seeking to overturn a trial court's Petrozziello ruling.

US v. GOODINE, No. 02-1953 (1st Cir. April 09, 2003)
http://laws.lp.findlaw.com/1st/021953.html
The First Circuit continues to adhere to a "hard line" as to Apprendi challenges in drug cases despite a strong argument from hometown attorney Peter Rodway.

A jury convicted Goodine of conspiracy and possession with intent to distribute cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) & 846 (2003). By special verdict form, the jury indicated that the amount for each count was at least five, but less than fifty grams of cocaine base. At sentencing judge Hornby determined by a preponderance that Goodine was responsible for 309.2 grams of crack, and sentenced him to 20 years, the mandatory minimum sentence under § 841(b)(1)(A).

First, Goodine alleges that the different penalty provisions under § 841(b) create separate crimes requiring the government to prove drug quantity beyond a reasonable doubt. Goodine asserts that he could *only* be sentenced pursuant to the jury's determination of drug quantity, but was erroneously sentenced pursuant to the judge's determination. Second, the judge imposed a mandatory minimum sentence based on drug quantity proved by preponderance of the evidence. Goodine raises an Apprendi challenge because that mandatory minimum sentence is higher than the sentencing guideline range to which he was exposed before the judge's finding as to drug quantity.

We find that drug quantity in § 841(b) is a sentencing factor, not an element of separate crimes. We also find that no Apprendi violation occurred here because the sentencing guidelines are not "statutory maximums" for purposes of Apprendi, and Goodine was not sentenced to a penalty greater

than that authorized by the jury's finding. Goodine's sentence is therefore affirmed.

If we adopted Goodine's argument, we would essentially abolish the guidelines because the jury would be required to make findings as to all facts that may be relevant to sentencing ranges and potential adjustments. Nothing in Apprendi or subsequent cases calls into question the validity of the Sentencing Guidelines, and "[w]e do not believe that the Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue." *Robinson*, 241 F.3d at 121. The guideline calculations are not restricted by Apprendi's rule. See *United States v. Knox*, 301 F.3d 616, 620 (7th Cir. 2002); *United States v. Norris*, 281 F.3d 357, 361 (2d Cir. 2002). The guidelines themselves state that where a "statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." 18 U.S.C.S. Appx. § 5G1.1 (2002). Nothing further is needed to impose a mandatory minimum sentence in excess of the guideline range, as the guideline range yields to the statutory minimum sentence.

The Court does acknowledge a circuit split on the issue setting the matter up for a potential Supreme Court showdown.

USEFUL CASES FROM "AWAY"

U.S. v. Fry, No. 01-17455 (3-18-03)
http://caselaw.lp.findlaw.com/data2/circs/9th/0117455p.pdf
Petitioner claims trial counsel was ineffective for failing to inform him of the collateral immigration consequences if convicted. The 9th affirms the denial of his petition, holding that informing of collateral immigration consequences was collateral to the main show, which was the criminal charge. Not talking about immigration consequences when a defendant is facing a criminal charge does not result in a sixth amendment ineffectiveness claim. The 9th joins the other circuits in so holding.

All other circuits to address the question have concluded that "deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel." *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *accord United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992), *cert. denied*, 507 U.S. 1039 (1993); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 942 (1990); *Santos v. Kolb*, 880 F.2d 941, 945 (7th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975)(*per curiam*).

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April showers continue. Lobster $ 7.49 lb. Song of the spring peeper (frogs) fill the night air.